Supreme Court, U.S.
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No. 87-1753

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

LEWIS duPONT SMITH,

Petitioner,

v.

E. NEWBOLD SMITH, MARGARET duPONT SMITH, STOCKTON N. SMITH, ELEUTHERA S. GRASSI, and HENRY B. duPONT SMITH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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DATED: May 23, 1988

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Does this Court possess jurisdiction under 28 U.S.C. §1257 to review by certiorari a judgment predicated on a state statute whose constitutionality is challenged in this Court, where petitioner failed to notify the Attorney General of Pennsylvania of the constitutional challenge as required by state procedural rule and where, for this reason and following its settled practice, the Superior Court of Pennsylvania, the highest state appellate court that reviewed the judgment, declined to rule on the constitutional questions?

2. Is Section 5501(1) of Pennsylvania's Guardianship Act, which authorizes the appointment of a guardian for any "incompetent" person — defined as one "who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety . . . is unable to manage his property, or is liable to dissipate it or become the victim of designing persons" — on its face or as applied violative of the First Amendment's guarantee of freedom of speech and right of association, as vague or substantially overbroad?

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COUNTER-STATEMENT OF THE CASE

A. Proceedings in the Trial Court.

Respondents, the parents, sister, and brothers of petitioner, Lewis duPont Smith ("Lewis"), brought this incompetency proceeding under the Pennsylvania Guardianship Act ("the Act"), 20 Pa. C.S.A. §5501, on April 11, 1985, in the Orphan's Court Division of the

Court of Common Pleas of Chester County, Pennsylvania, seeking a declaration that petitioner is "incompetent" within the meaning of the Act; that is, that he is "a person who, because of . . . mental illness, mental deficiency or retardation . . . is unable to manage his property or is liable to dissipate it or become the victim of designing persons." 20 Pa. C.S.A. §5501(1).[1]

On the same day, the Court of Common Pleas, per the Honorable Lawrence E. Wood, entered a preliminary injunction enjoining Mellon Bank East and Lewis duPont Smith from "transferring any assets from any account of Lewis duPont Smith until further order" of the Court and scheduled a hearing for April 26, 1985. On May 1, 1985, on respondents' unopposed motion, the Court directed petitioner to present himself for psychological examination by Dr. David Halperin, M.D.

After an eight-day hearing, the trial court on November 12, 1985, entered a Decree Nisi finding petitioner to be "incompetent within the meaning of 20 Pa.C.S.A. 5501" and concluding that petitioner "by reason of mental illness, is unable to manage his property; or is liable to dissipate it or become the victim of designing persons." (Pet. App. at 26a).[2] The court appointed a guardian other than a member of petitioner's family.

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1. In addition to filing a Petition for Adjudication of Incompetency and Appointment of a Guardian for the Estate of the Incompetent, respondents filed a petition for a preliminary injunction, requesting that petitioner be restrained from transferring his assets to organizations affiliated with Lyndon LaRouche ("LaRouche").

Petitioner also commenced related litigation in the United States District Court for the Eastern District of Pennsylvania, which dismissed the action. Petitioner did not appeal that dismissal. *Smith* v. *Wood*, 649 F.Supp. 901 (E.D. Pa. 1986).

2. References herein to the Petition are denoted by the abbreviation "Pet." followed by the page number. References to the Appendix to the Petition are denoted "Pet. App." followed by the page number of that Appendix.

The heir to a substantial estate, Lewis duPont Smith had, prior to the institution of this proceeding, squandered a considerable portion of it in a series of highly speculative, "ill advised" investments. In 1981, he lost an $80,000 investment in the American Walnut Corporation. In May of that year, he lost over $23,000 in silver bullion. In a two-month period beginning in March, 1984, he invested roughly $74,000 in various stocks, all but $22,000 of which he lost.

In the spring of 1983, he purchased magazines published by a LaRouche-affiliated organization and had his first of several conversations with a LaRouche supporter staffing an airport sales table. Several months later, he was approached by one David Goldman ("Goldman"), ostensibly a "financial adviser," who attempted to solicit a "loan" from him on behalf of a company known as Caucus Distributors, Inc. ("CDI"), a LaRouche-affiliated organization.

During the following year, organizations dominated by LaRouche maintained periodic contact with Lewis. In the summer of 1984, Lewis vacationed at his family's summer home in Maine. Although he had not furnished them with his Maine summer address, representatives of the LaRouche organizations successfully tracked him down, obtained his telephone number, and telephoned him there again for the purpose of soliciting money from him. His brother, Henry, who was with him in Maine, testified that Lewis initially resisted these overtures and "felt as [though] he was violated, his rights were violated; he was very upset that they traced his location to Maine because he had not told them that he was up in Maine." Lewis told Henry, in August 1984, that LaRouche was "off the wall" and that there was "no way" that he, Lewis, would support LaRouche.

A month later, Goldman began to telephone Lewis "every night", sometimes calling "two or three times a night" to solicit money for LaRouche. Lewis was warned by his roommate that Goldman was "an idiot" and

cautioned him that Goldman was trying to "take you for all you're worth." Lewis agreed. Nonetheless, LaRouche operatives later succeeded in inducing him to attend a series of "lectures" at the Schiller Institute, an arm of the LaRouche organization. In late 1984 and early 1985 he became "deeply involved" in LaRouche's organization, experienced "nightmares" and became "extremely withdrawn, tense, up tight [and] nervous." He underwent a personality change, lost weight, suffered from depression, and began to parrot LaRouche's "philosophy".

He also began to make sizeable "contributions" to LaRouche's CDI. In a four-week period commencing in February, 1985, he transferred $42,000 to CDI. On one day, March 20, 1985, Lewis made two separate $50,000 wire transfers to CDI, and received an unsecured promissory note in the amount of $142,000. When asked by his family about these transactions, Lewis stated that he had "loaned" CDI this money. At the hearing in this matter, however, he disclaimed any interest in being paid back.

Lewis later denied having provided CDI with any additional financial support. However, records showed that, on April 2, 1985, two weeks after he had made the two $50,000 wire transfers, he had given CDI an additional $20,000, and on April 4, 1985, an additional $50,000 contribution. When reminded of these additional contributions, he was unable to say whether they were loans or gifts. He stated that $20,000 of the $70,000 "gift" was secured by an undeposited, postdated check, but, in response to inquiries by the Court during the hearing, he was unable to "come up with a reasonable explanation as to what" the $50,000 represented because he was "a little bit confused." In addition to this $70,000 "gift," Lewis also paid over $17,000 to LaRouche-affiliated organizations for magazine subscriptions and "tutorial" instructions. Although Lewis initially believed that he had given (or "loaned") a total of

$144,000 to LaRouche-affiliated organizations, he had, in fact, transferred to them a total of $212,000.

On April 7, 1985, Lewis told his brother that he did not intend to give any further money to LaRouche organizations. Three days later, he attempted to wire transfer $75,000 to Capital Investment Group ("CIG"), another LaRouche-affiliated entity.

Lewis' behavior during this period had also become increasingly bizarre. He penned a rambling, nonsensical letter to his brother in which he described Mrs. Gorbachev as the "Bo Derek of the steps [sic] to Central asia" and charged that "Paul Adolph Volker" had "creat[ed]" an economic recovery to satisfy his "pederastic, oligarchical whims." He signed the letter "Lewis (Alius [sic] your neo-platonic, republican, polemical brother, Socrates)."

Alarmed by Lewis' behavior and the steady dissipation of his assets, respondents instituted this action on April 11, 1985.

Pursuant to court order in this proceeding, Dr. David A. Halperin, a psychiatrist who has written extensively on the psychodynamics of cults and cult recruiting, conducted a lengthy and complete mental competency examination of Lewis, consulted with Lewis' family, reviewed Lewis' writings and was present when Lewis testified in Court and observed his demeanor and responses. At the hearing in the trial court, Dr. Halperin testified that in his opinion, Lewis is mentally ill and suffers from a schizophrenic affective disorder as defined by the Diagnostic Statistical Manual, 195.70 ("DSM III"), the authoritative reference work used by the psychiatric profession. According to Dr. Halperin, Lewis' mental illness exhibits both a psychotic component and an affective disorder which renders him unable to appreciate reality or to relate to it in any method other than in an "inappropriate and disfunctional fashion." He suffers "delusions of persecution," evident in his frequent references to his being "at risk" and in his belief

that his "life [is] in danger." He manifests the traditional symptoms of a "paranoid individual." In support of this diagnosis, Dr. Halperin pointed to Lewis' use of "magical words," his adoption of grandiose pseudonyms, and his drawings exhibiting a psychotic process, and testified that Lewis suffers from a "gross loss" of his sense of self, that his ego is grossly diminished and that he is "fragile." Lewis' affective disorders are manifested in his periodic depression and support a "secondary diagnosis of mixed organic mental disorder." Lewis' organic brain disorder[3] was confirmed at the hearing when Lewis was asked to count backwards from one hundred by threes, and was unable to do so.

On the basis of his entire examination of Lewis and Lewis' performance in Court, Dr. Halperin unequivocably found that Lewis suffers from a "mental illness" which makes him unable to manage his property, liable to dissipate it or to become the victim of designing persons.

Two doctors who testified on Lewis' behalf agreed that he suffers from a personality disorder *i.e.*, a "mental disorder". One agreed that Lewis' mental disorder could make him more likely than most to be the subject of designing persons because he is more vulnerable and helpless than most and because he is easily influenced, and further agreed that he has the type of "ego weakness" that is consistent with the diagnosis of schizophrenia. A second doctor diagnosed Lewis as suffering from a "schizotypal" mental disorder, agreed that Lewis suffers from "organic brain damage," and further agreed that, "under proper stress," Lewis could suffer from "episodes of schizophrenia."

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3. As Petitioner's Prehearing Memorandum in the trial court admitted, Lewis also has "a record of congenital dyslexia (impairment of the normal ability to read, due to a defect in the brain)." (Prehearing Memorandum at 2).

The trial court found by clear and convincing evidence that petitioner suffers from a "mental illness" and for that reason is "unable to manage his property, or is liable to dissipate it or become the victim of designing persons." (Pet. App. 26a).

B. Proceedings in the Pennsylvania Superior Court.

Petitioner filed an appeal to the Superior Court of Pennsylvania, which, after briefing and oral argument, affirmed the trial court's judgment on July 21, 1987. In its opinion, the Superior Court held that "the trial court acted within its sound discretion in finding that [respondents] proved [petitioner's] mental illness by clear and convincing evidence." (Pet. App. at 9a). The Superior Court took note of the expert psychiatric testimony that petitioner suffers from "a schizophrenic affective disorder which renders him unable to appreciate reality as to relate to it in any way other than in an 'inappropriate and disfunctional fashion' "; that petitioner suffers delusions of persecution; and that "[b]ecause of this mental illness, [petitioner] cannot objectively judge those who say that they share his common ideology thus making it very easy for [petitioner] to get swept up in his colleagues' ideas that are of a financial nature." (Pet. App. at 9a).

The Superior Court specifically rejected petitioner's contention that the trial court had made a finding only of a "mental *disorder*" not a finding of "mental illness," as required by the Act, and pointed to the trial court's specific finding of "mental *illness*." (Pet. App. at 10a; 26a). The Court also rejected petitioner's contention that the evidence showing that he was liable to dissipate his property or become the victim of designing persons did not satisfy the "clear and convincing evidence" standard. The Superior Court also held that the trial court did not err in concluding that the Act "is designed to protect one who has been peculiarly disabled by his or her mental make up from resisting the exploitation of

others," that in this case "[t]he evidence indicate[d] that the exploitation has already begun," that the fact that these events had already transpired was some evidence that petitioner was liable to dissipate his property, and that "unless the Court intervene[d], Lewis will continue to squander his admittedly substantial resources." (Pet. App. at 11a).

In a concurring opinion, Judge Beck observed that "the incompetency statute was not applied in a discriminatory fashion" (Pet. App. at 14a), and noted petitioner's "convict[ion] in federal court of assaulting in an airport an individual who had questioned LaRouche's policies." (Pet. App. at 16a). The concurring opinion also referred to the testimony of petitioner's own psychiatric expert that by reason of petitioner's mental disorder "he's more likely to be influenced, conned, if you will, than the average individual." (Pet. App. at 16a).

C. Denial of Allowance of Appeal to the Supreme Court of Pennsylvania.

Petitioner's petition for allowance of appeal to the Supreme Court of Pennsylvania, was denied by that Court by Order dated January 21, 1988.

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE PETITIONER FAILED TO FOLLOW VALID STATE PROCEDURES IN CHALLENGING THE CONSTITUTIONALITY OF THE PENNSYLVANIA GUARDIANSHIP ACT IN THE LOWER COURTS, AND THIS COURT IS THEREFORE WITHOUT JURISDICTION

None of the three constitutional questions presented in the Petition is properly before this Court, and the Court therefore lacks jurisdiction under 28 U.S.C. § 1257 to review the judgment below.

In order properly to present a federal question in this Court a litigant must comply with reasonable state

procedures for raising such an issue in the state courts. Failure to do so will prevent review by this Court. *In re Lamkin*, 355 U.S. 59, 2 L.Ed.2d 107, 78 S.Ct. 137 (1957); *Ferguson v. Georgia*, 365 U.S. 570, 572, 5 L.Ed.2d 783, 785, 81 S.Ct. 756, 758 (1961). Thus, this Court will decline to exercise jurisdiction where the highest state court expressly refuses to decide the federal question because of a procedural defect in the manner in which the litigant raised or sought to raise the issue. *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 462-463, 80 L.Ed. 796, 803-804, 56 S.Ct. 556, 561 (1936); *Erie R. Co. v. Purdy*, 185 U.S. 148, 46 L.Ed. 847, 22 S.Ct. 605 (1902). In addition, where a federal constitutional issue was not raised in the trial court, as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediate court, the highest state court's action in refusing without opinion to hear the case precludes review on certiorari by this Court. *Stembridge v. Georgia*, 343 U.S. 541, 547, 96 L.Ed. 1130, 1133-1134, 72 S.Ct. 834, 837 (1952).[4]

Rule 235(a) of the Pennsylvania Rules of Civil Procedure specifically requires that, in any proceeding in a Pennsylvania trial court in which it is asserted that a Pennsylvania statute is unconstitutional and the Commonwealth of Pennsylvania is not a party, the litigant raising the constitutional issue must promptly give notice to that effect by registered mail to the Attorney

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4. The Court's decision in *Cicenia v. La Gay*, 357 U.S. 504, 507-08 n.2, 2 L.Ed.2d 1523, 1527, 78 S.Ct. 1297, 1299 (1958) where the intermediate state appellate court specifically addressed the constitutional argument, does not require any different result in this case. Here the intermediate state appellate court expressly declined to rule on the constitutional arguments because they had not been properly preserved. (Pet. App. at 5a-6a).

General of Pennsylvania.[5] In addition, Rule 521 of the Pennsylvania Rules of Appellate Procedure specifies a similar procedure applicable when a litigant seeks to draw into question the constitutionality of any statute in a Pennsylvania *appellate* court in any manner to which the Commonwealth or any officer thereof is not a party. Rule 521 similarly requires the litigant raising such a constitutional challenge to provide notice to the Attorney General of Pennsylvania.[6] The requirement is a reason-

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5. Rule 235(a) provides:

> Notice to Attorney General.
> Constitutionality of Statute.
>
> (a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice.

6. Pa. R.App.P. 521 provides:

> Rule 521. Notice to Attorney General of Challenge to Constitutionality of Statute.
>
> (a) *Notice.* It shall be the duty of a party who draws in question the constitutionality of any statute in any matter in an appellate court to which the Commonwealth or any officer thereof, acting in his official capacity, is not a party, upon the filing of the record, or as soon thereafter as the question is raised in the appellate court, to give immediate notice in writing to the Attorney General of Pennsylvania of the existence of the question; together with a copy of the pleadings or other portion of the record

able one and parallels a similar federal procedure defined in 28 U.S.C. §2403, which differs only in placing responsibility for providing notice on the courts.

The Pennsylvania appellate courts consistently adhere to the rule that failure to provide such notice in compliance with Pa. R. Civ. P. 235(a) and Pa. R. App. P. 521 will result in the refusal by Pennsylvania courts to address the constitutional issues sought to be raised. *See In the Matter of the Adoption of Christopher P.*, 480 Pa. 79, 90, 389 A.2d 94, 100 (1978); *Wiegand v. Wiegand*, 461 Pa. 482, 337 A.2d 256 (1975); *Fetterhoff v. Fetterhoff*, 354 Pa. Super. 438, 444, 512 A.2d 30, 33 (1986); *Faust v. Messinger*, 345 Pa. Super. 155, 159, 497 A.2d 1351, 1353 (1985).

In this case, petitioner admits (Pet. 9-10) that no notice was ever provided, as required by Pa. R. Civ. P. 235(a) and Pa. R. App. P. 251, until petitioner filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. The suggestion in the petition (Pet. at 9) that this rule did not apply because petitioner's arguments were framed solely in "syllogistic form" is belied by the Superior Court's observation (Pet. App. at 5a) that petitioner specifically raised the question in that court "whether the competency statute is constitutional on its face." Petitioner's brief in the Superior Court did raise a facial challenge and articulated the circumstances in which "[a] classic definition of overbreadth declares a statute facially void. . . ." (Brief for Appellant in the Superior Court, at 47). Thus, petitioner was not relieved of the obligation to comply with the Pennsylvania rules in this case. The Superior Court of Pennsylvania, as it

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raising the issue, and to file proof of service of such notice.

(b) *Status of Attorney General.* The Attorney General may be heard on the question of the constitutionality of the statute involved without formal intervention. If the Attorney General files a brief concerning the question the Commonwealth shall thereafter be deemed to be an intervening party in the matter.

stated in its opinion below, "*decline[d] to address [the constitutional] issues as [petitioner] did not give notice to the Attorney General of Pennsylvania as required by Pa. R. A. P. 521.*" (Pet. App. 5a-6a).

Since Petitioner has failed properly to raise and preserve any of the constitutional questions sought to be raised in the Petition, the Petition should be denied.[7]

II. THE PENNSYLVANIA GUARDIANSHIP ACT DOES NOT VIOLATE THE FIRST AMENDMENT ON ITS FACE OR AS APPLIED.

Pennsylvania's Guardianship Act is modelled on the Uniform Probate Act. Similar statutory provisions are in effect in numerous other states. Guardianship provisions for persons of unsound mind have a long history,[8] and

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7. Petitioner has manifestly failed to support his suggestion that "the Superior Court's refusal to deal with petitioner's federal arguments was a mere evasion of the issues and also was utilized in a manner which unfairly discriminated against the assertion of petitioner's federal claims." (Pet. at 10). The non-precedential plurality opinion in *Commonwealth ex rel. Stein v. Stein*, 487 Pa. 1, 7-8, 406 A.2d 1381, 1384-1385 (1979), cited by Petitioner as an instance in which compliance with these procedural rules was not required, did not create an exception that is applicable here. The *Stein* case is clearly distinguishable. In *Stein*, "the Attorney General *was* duly notified of petitioner's claims on appeal of the matter to the Superior Court and to [the Supreme Court of Pennsylvania]." Thus, the rule has not been applied to petitioner in discriminatory fashion in this case, in which notice was not given to the Attorney General on appeal to the Superior Court.

Nor is there contrary holding in this Court's decisions in *Rogers v. Alabama*, 192 U.S. 226, 48 L.Ed. 417, 24 S.Ct. 257 (1904), in which the Alabama lower court refused to reach the constitutional issue of exclusion of blacks from the jury because of "prolixity" of defendant's two-page trial court motion to quash the indictment, or *Nickel v. Cole*, 256 U.S. 222, 65 L.Ed. 900, 41 S.Ct. 467 (1921), in which the lower state court had adopted a plainly untenable view of a written instrument to evade the constitutional issue.

8. Maitland traces legal guardianship for "lunatics" and "idiots" to the *Praerogativa Regis* of the time of Edward I. 1 Pollock

they serve a legitimate and important state interest. The power of the states to provide in this fashion for the health and welfare of their citizens is well-established. Petitioner points to no case in which their constitutionality has ever been doubted. In fact, as petitioner candidly admits, the constitutional arguments in this case are issues of "*first impression*." (Pet. at 11).

The Act contains significant safeguards against misapplication. The Pennsylvania courts have erected a presumption of mental capacity and competency and have required "clear and convincing evidence" of mental incompetency to warrant appointment of a guardian under §5501. *Matter of Caine*, 490 Pa. 24, 415 A.2d 13 (1980). That standard was applied by the lower courts in this case. (Pet. App. at 7a, 25a). Moreover, the statute is narrowly tailored to reach its object. Under the Act, a guardian may not be appointed merely because a person lacks the ability or experience needed to manage large sums of money. *In re Estate of Porter*, 463 Pa. 411, 345 A.2d 171 (1975). Nor does it suffice simply to show mental illness. The guardianship procedure does not apply to *all* cases of mental illness. Rather, the statute requires proof of three concurrent elements (1) that the alleged incompetent suffers from "mental illness" infirmities of old age, mental deficiency or retardation, drug addiction or inebriety, (2) that the alleged incompetent is "unable to manage his property or is liable to dissipate it or become the victim of designing persons," and, most importantly, (3) that the inability to manage his or her property *results from* the mental condition required by the statute to be shown. *Matter of Caine*, *supra*.

& Maitland, The History of English Law 481; 1 W.S. Holdsworth, A History of English Law 473. Similar guardians (*cura furiosi*) are known to have existed under Roman Law. W.W. Buckland, Textbook of Roman Law from Augustus to Justinian (3d ed.) 168.

These three statutory elements together provide a clear and objective standard which is sufficiently definite to survive constitutional scrutiny. Moreover, the Pennsylvania statute and similar statutes in other jurisdictions have been subjected to decades of case-by-case judicial interpretation. As a result, there is a well-developed body of judicial interpretation of the statutory terms — a circumstance adding further certainty in their administration and tending to undermine any contention that the Act is unconstitutionally vague. *See, United States Civil Service Commission v. National Association of Letter Carriers*, 413 U.S. 548, 568-581, 37 L.Ed.2d 796, 810-818, 93 S.Ct. 2880, 2892-2898 (1973).

Petitioner's facial vagueness and overbreadth arguments are without substance.

A. The Guardianship Act Is Not Overbroad.

The State's legitimate interests in protecting the financial resources of incompetents are well-established and substantial. They include not only the state's interest in protecting its fisc by minimizing the number of persons who become charges of the state, but also its interest in providing for the welfare of incompetent persons. The Act is narrowly tailored to serve these legitimate state interests. It addresses only the subject which lies within the State's traditional and legitimate legislative powers to protect the welfare of citizens suffering from mental illness that makes them vulnerable to dissipating their assets and likely victims of designing persons. Nor does the Act establish an impermissible content-based restriction of protected activities.[9] The Act is not overbroad at all.

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9. The Act is not a criminal provision, which "must be scrutinized with particular care." *City of Houston v. Hill*, 482 U.S. ___, 96 L.Ed.2d 398, 107 S.Ct. 2502, 2508 (1987); *Winters v. New York*, 333 U.S. 507, 517, 92 L.Ed. 840, 68 S.Ct. 665, 670 (1948). The

A facial overbreadth challenge to a statute, moreover, must fail where the enactment does not reach "a substantial amount of constitutionally protected conduct." *Boos v. Barry*, ____ U.S. ____, 99 L.Ed.2d 333, 108 S.Ct. 1157, 1169 (1988); *City of Houston v. Hill*, 482 U.S. ____, 96 L.Ed.2d 398, 107 S.Ct. 2502, 2508 (1987); *Hoffman Estates v. The Flipside*, 455 U.S. 489, 494, 71 L.Ed.2d 362, 369, 102 S.Ct. 1186, 1191 (1982). Measured by this applicable standard, Petitioner's facial overbreadth challenge is plainly without merit.

Even if it is assumed that speech and expressive activities of an adjudicated incompetent suffering from a "mental illness" are entitled to the full protection of the First Amendment,[10] the Act does not touch conduct that lies at the core of the First Amendment. It does not restrict an adjudicated incompetent from engaging in classically political speech or association, such as reading, writing, publishing, speaking, circulating publications of any nature, attending meetings of political or social organizations or the like. The guardianship procedure involves only a limitation on the incompetent's disposition of his or her funds. Insofar as appointment of a guardian under the Act may therefore result in some incidental restriction on direct or indirect contributions

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Court has expressed "greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe." *Hoffman Estates v. Flipside*, *supra*, 455 U.S. at 498-499, 71 L.Ed.2d at 371-372, 102 S.Ct. at 1193.

10. The Court has intimated that the protection of the First Amendment does not extend to its fullest degree to expressive activities of minors, although minors are still "entitled to a significant measure of First Amendment protection." *Tinker v. Des Moines School District*, 393 U.S. 503, 21 L.Ed.2d 731, 89 S.Ct. 733 (1969). The same rationale may also apply to incompetents, at least where the activities threaten their welfare by depleting their assets and, as the trial court found in this case, the incompetent "no longer has the ability to 'choose' in either a knowledgeable or totally voluntary way." (Pet. App. at 25a).

of money, gifts and loans to political parties, candidates or social and political causes, the Act affects only conduct that does not enjoy the same degree of First Amendment protection which extends to speech and other activities that lie at the core of the First Amendment's protection.

In *Buckley v. Valeo,* 424 U.S. 1, 46 L.Ed.2d 659, 96 S.Ct. 612 (1976), involving the constitutionality of expenditure and contribution limitations of the Federal Election Campaign Act, the Court drew a sharp distinction between those statutory provisions of the FECA that directly limit *speech* and the FECA's statutory limitations on political *contributions*. The Court said:

> "[A] limitation upon the amount that any one person or group may contribute to a candidate or political committee *entails only a marginal restriction upon the contributor's ability to engage in free communication*. A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support." 424 U.S. at 20-21, 46 L.Ed.2d at 688-689, 96 S.Ct. at 635.

As the Court also pointed out, "[a] limitation on the amount of money a person may give to a candidate or campaign organization *thus involves little direct restraint on his political communication. . . .*" 424 U.S. at 21, 46 L.Ed. 2d at 689, 96 S.Ct. at 636.

The Pennsylvania Guardianship Act does not reach a substantial amount of constitutionally protected conduct, if any, and the conduct that the Act may incidentally affect does not lie at the core of the First Amendment. To the extent the Act incidentally touches *any* protected activity, it entails only a "marginal restriction upon the contributor's ability to engage in free communication" and is not substantially overbroad.

B. The Guardianship Act Is Not Unconstitutionally Vague.

The Act likewise is not unconstitutionally vague. It does not proscribe any willful and voluntary conduct. The Act does not erect a standard for regulation of or sanction for conduct. Rather, a person is subject to guardianship procedures if he or she possesses the specific characteristics defined by the statute. As such, many of the usual concerns regarding vague statutes do not exist in this case, and "no necessity exists for guidance so that one may avoid the applicability of the law." *Boutilier v. Immigration & Naturalization Service*, 387 U.S. 118, 123-24, 18 L.Ed.2d 661, 666, 87 S.Ct. 1563, 1566-67 (1967). The Act can therefore have no "chilling effect" on the exercise of First Amendment rights.

The subject-matter of the Act does not lend itself to mathematical precision, nor is it required. As the Court has acknowledged, "[t]he subtleties and nuances of psyciatric diagnosis render certainties beyond reach in most situations," *Addington v. Texas*, 441 U.S. 418, 430, 99 S.Ct. 1804, 1811, 60 L.Ed.2d 323, 333 (1979). A statute will not be invalidated as vague simply because it is difficult to determine whether certain marginal instances fall within its language. *Jordan v. DeGeorge*, 341 U.S. 223, 231, 95 L.Ed. 886, 71 S.Ct. 703, 708 (1951). No more than "a reasonable degree of certainty is required." *Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 96 L.Ed. 367, 72 S.Ct. 329, 331 (1952). The Act satisfies these standards of clarity and precision.

Each of the statutory terms, moreover, has a well-established meaning. Used in conjunction, they jointly attain even greater clarity and precision by mutual elimination of potential ambiguities. Thus, the meaning of the term "mental illness" in the Act is qualified and clarified by its use in conjunction with the terms "unable to manage his property," "liable to dissipate it,"

and "become the victim of designing persons." In addition, one of the Act's key operative terms, "mental illness," has repeatedly been held not to be unconstitutionally ~~vague in~~ statutes defining the criminal defense of mental illness and in statutes relating to termination of parental rights on grounds of mental illness.[11]

The Act is not unconstitutionally vague.

C. The Guardianship Act As Applied To Petitioner Does Not Violate The First Amendment.

The Act was not unconstitutionally applied in this case. Relying on eight days of psychiatric expert testimony, the results of extensive psychological examination, review of petitioner's writings, detailed scrutiny of the manner in which petitioner attended to his personal finances, the testimony of family members and the court's own observation of him in the courtroom, the

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11. *See In the Matter of the Appeal in Maricopa County Juvenile Action No. JS-5209 and No. JS-4963*, 143 Ariz. 178, 692 P.2d 1027 (Ariz. Ct. App. 1984) ("mental illness"); *People v. Lakey*, 102 Cal.App.3d 962, 162 Cal.Rptr. 653 (1980) ("mental disorder"); *In the Matter of Salem*, 31 N.C.App. 57, 228 S.E.2d 649 (1976) ("mental illness"); *People v. Taylor*, 618 P.2d 1127 (Colo. 1980) ("mentally ill persons"); *In re Beverly*, 342 So.2d 481 (Fla. 1977); *In re Mark K. v. Harold K.*, 159 Cal.App.3d 94, 205 Cal.Rptr. 393 (1984) ("mental illness"); *Cooper v. State*, 253 Ga. 736, 325 S.E.2d 137 (1985) ("mentally ill"); *People v. Lang*, 113 Ill.2d 407, 498 N.E.2d 1105 (1986) ("mental illness"); *Smith v. State*, 486 N.E.2d 465 (Ind. 1985) ("mentally ill"); *F.J. v. State*, 411 N.E.2d 372, 78 Ind. Dec. 454 (Indiana App. 1980) ("mentally ill"); *In the Matter of T.C.F.*, 400 N.W.2d 544 (Iowa 1987) ("mental illness"); *In the Matter of Everette Elizabeth Gentry v. Gentry*, 142 Mich.App. 701, 369 N.W.2d 889 (1985) ("mental illness"); *People v. Deyampert*, 140 Mich.App. 530, 364 N.W.2d 373 (1985) ("mental illness"); *In re Interest of D.L.H. v. A.H.*, 198 Neb. 444, 253 N.W.2d 283 (Neb. 1977), *In the Matter of Sylvia M.*, 82 A.D.2d 217, 83 A.D.2d 925, 443 N.Y.S.2d 214 (1981) ("mental illness"); *In re Roger C. Ryan*, 97 Wash.2d 284, 644 P.2d 675 (1982) ("mental illness" and "mental incapacity").

trial court, employing the standard of "clear and convincing" evidence, found that Lewis duPont Smith was a person who because of mental illness "is unable to manage his property, or is liable to dissipate it or become a victim of designing persons." (Pet. App. at 26a). In appointing a guardian, the trial court in no way limited petitioner's right "to speak, believe, or associate with others." (Pet. App. at 18a). The trial court "only limited [petitioner's] use of his money to the extent necessary to prevent him from dissipating his assets to any substantial degree." (Pet. App. at 18a).

The trial court's ruling struck the appropriate balance between any First Amendment interests of an adjudicated incompetent, suffering from mental illness and highly vulnerable to manipulation, and the important protective purpose of the Act. The trial court's appointment of a guardian under the Act was narrowly fashioned to make the least possible intrusion on petitioner's activities, and the appointment of a guardian directly and substantially advances the legitimate and important objectives of the Act.

The Act was not unconstitutionally applied in this case.

III. NO CONFLICT AMONG THE CIRCUITS OR THE STATE COURTS REQUIRES THIS COURT'S REVIEW OF STATE GUARDIANSHIP STATUTES.

As petitioner concedes, "[t]his is a case of first impression." (Pet. at 11). Petitioner has made no showing that the insubstantial constitutional questions sought to be presented in the Petition have divided the courts of appeals or the state appellate courts. Petitioner points to no substantial body of decisional law or commentary that addresses the questions raised in the petition, and the issues do not otherwise warrant this Court's attention.

Moreover, in this case, in which the lower courts have declined to address the constitutional issues raised in the Petition, it would be inappropriate and contrary to this Court's settled practice to grant certiorari to decide in the first instance issues which have not been decided by the lower courts. *Singleton v. Wulff*, 428 U.S. 106, 120, 49 L.Ed.2d 826, 837, 96 S.Ct. 2868, 2877 (1976); *Youakim v. Miller*, 425 U.S. 231, 234, 47 L.Ed.2d 701, 705, 96 S.Ct. 1399, 1401 (1976).

No satisfactory reason exists to depart from that practice in this case.

CONCLUSION

The petition is an attempt to induce review on insubstantial constitutional issues of "first impression" that were not properly preserved in the state courts below, and which for that reason were not decided below.

The petition should be denied.

Respectfully submitted,

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